

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.1473 OF 2016

Dr.Vijaykumar Gulabrao Kharat,
Age 41 years, Occ.Medical Practitioner,
R/o.Shivam Hospital, In front of Shubham
Gardan, Azad Maidan, Jalna.

Petitioner

versus

1. The State of Maharashtra
through its Secretary, Public Health Deptt;
Mantralaya, Mumbai.

2. Dr.S.G.Pandit,
District Appropriate Authority & Representative
of Civil Surgeon, Jalna Civil Hospital,
Jalna.

Respondents

Mr.Swapnil S. Patunkar for petitioner.
Mr.A.A.Jagatkar, APP, for Respondents-State

CORAM : PRAKASH D. NAIK, J.
DATE : 8th November 2017

ORAL JUDGMENT :

1. The petitioner has challenged the judgment and order dated 16th June 2016 passed by learned Additional Sessions Judge, Jalna in Criminal Revision Application No.11 of 2014 confirming the order dated 30th January 2014 passed by Chief Judicial Magistrate, Jalna.

2. The case of the petitioner is that he is a qualified medical practitioner having his hospital at the address mentioned in cause

title of the petition. The complaint was lodged by respondent no.2 before the Trial Court, which was numbered as STC No.869 of 2011. The said complaint was filed alleging violation of the provisions of Pre Conception and Natal Diagnostic Techniques (Prohibition of Sex Selection) Act ('PCPNDT Act'). It is further alleged that copy of PCPNDT Act was not available at the centre as well as Form-F was not available. Several other violations were alleged in the complaint which amounts to offence under PCPNDT Act. The said complaint was filed before the Court of Chief Judicial Magistrate, Jalna.

3. Subsequently the evidence before charge was recorded. While recording evidence, the witness produced a copy of authorization letter dated 24th May 2011 which was exhibited in evidence vide Exhibit-27. The Chief Judicial Magistrate passed an order dated 30th January 2014 observing that charge is required to be framed under Section 25 of PCPNDT Act. In pursuant to the that, the petitioner preferred Revision Application No.11 of 2014 before the Sessions Court, at Jalna. The said revision application was rejected vide order dated 16th June 2016. Hence, the petitioner has approached this Court challenging the proceedings and the orders passed by the subordinate Courts.

4. Learned counsel for the petitioner submitted that the proceedings under the PCPNDT Act are not tenable in law. It is submitted that the learned Magistrate proceeded to pass an order stating that charge is required to be framed under Section 25 of PCPNDT Act. The complaint and the evidence of the witness who was examined by the prosecution before the charge, does not substantiate framing of charge under Section 25 of the said Act and,

therefore, the prosecution cannot proceed against the petitioner. It is further submitted that there was clear evidence of PW-1 Dr.G.M.Gaikwad that the complaint is not filed by appropriate authority and, therefore, the proceedings are not maintainable.

5. It is further submitted that evidence of Dr.G.M.Gaikwad who has been examined as witness no.1, refers to the authority being granted to Dr.S.G.Pandit who had filed the complaint. It is submitted that witness no.1 could not have delegated the powers in the absence of any provision for delegating the powers to Mr.S.G.Pandit or authorizing him to file the complaint. It is also submitted that even Dr.G.M.Gaikwad had no authority to file the complaint and in the absence of such authority, the question of Mr.S.G.Pandit filing complaint does not arise. It is submitted that taking the evidence as it is, no case is made out by the prosecution to frame charge under Section 25 of the PCPNDT Act. It is further submitted that the powers of delegation were not in existence on the date when the complaint was filed, as the provision was incorporated subsequently. It is submitted that the complaint has been filed on 11th August 2011 and at that time civil surgeon was the appropriate authority to file complaint under the said Act. On 26th April 2017, there is an amendment in PCPNDT Rules. Rule 18-A has been inserted and then the appropriate authority has been authorised to delegate his powers. The present complaint was prior to amendment and, hence, appropriate authority was not having power to delegate powers. Therefore, the complaint filed by Dr.Pandit is not maintainable. Learned counsel referred to Section 28 of the PCPNDT Act which deals with the provision relating to taking of cognizance of the complaint. It is submitted that as per Section 28, no Court shall take

cognizance of an offence under the Act except on the complaint made by appropriate authority or any officer authorized in that behalf by the Central Government or State Government or the appropriate authority, as the case may be. Since the complaint is not filed by the appropriate authority as required under the said provision, it would be an abuse of process of law to continue such prosecution against petitioner. It is, therefore, submitted that the orders passed by subordinate Court and the proceedings initiated against the petitioner may be quashed and set aside.

6. He relied upon the decision of this Court in Criminal Writ Petition No.348 of 2003 in the case of Dr.Girish Chandrakant Paknikar Vs. The State of Maharashtra and another dated 4th February 2014. Reliance is also placed on another decision of this Court in case of Vinod Murlidhar Kotkar (Dr). Vs. State of Maharashtra and another reported in 2015-All.M.R. (Cri).-1530.

7. Learned APP submitted that the points raised by the petitioner can be agitated at the time of trial. Presently the evidence before charge has been recorded. The proceedings need not be quashed at this stage. The prosecution be given an opportunity to adduce evidence after framing of charge and it would be open to the accused to rebut the said evidence by cross examination or by raising appropriate defenses. The prosecution has filed a reply opposing the prayers made in this petition.

8. In the affidavit-in-reply filed by respondent no.2 dated 6th November 2016, it has been stated that Dr.G.M.Gaikwad, District Civil Surgeon, Jalna was the appropriate authority under PCPNDT

Act. He had inspected the concerned hospital with Naib Tahsildar Mr.Rangnath Wazar. It is further stated that during the inspection, it was found that there was no sonography machine in the hospital and it was told by the doctor that the said machine was kept at his residence. The squad had seized the prescription pad wherein it was printed that 'sonography facility available'. Panchanama was conducted and show cause notice was issued by Dr.G.M.Gaikwad on the basis of inspection and panchanama dated 18th April 2011. It is further stated that Dr.G.M.Gaikwad had delegated his power vide letter dated 24th May 2011 wherein Dr.G.S.Pandit, deponent of the affidavit-in-reply, was authorized to take necessary action under PCPNDT Act. A copy of said letter dated 24th May 2011 has been annexed to the affidavit-in-reply. It is further stated that in pursuant to the letter, Dr.G.S.Pandit had visited and inspected the premises of the petitioner-accused and found the sonography machine, which was kept in the room. The said machine was thereafter sealed. The affidavit further indicates that Government of Maharashtra had issued a notification dated 12th February 2008 wherein it is stated that every District Civil Surgeon, Medical Superintendent (Rural), Additional Collector, Sub Divisional Officer, Tahsildar, Naib-Tahsildar, Commissioner of Municipal Corporation, Additional Municipal Commissioner, Ward Officers, Chief Officer of Municipal Council etc. have been empowered and have been given authorization to conduct and inspect the sonography centres. Dr.Gaikwad was District Civil Surgeon and delegated his powers to Dr.Pandit, who was a Class-I Medical Officer and, therefore, he was an appropriate authority to conduct inspection and to prosecute the complaint against the petitioner.

9. I have perused the documents on record. Dr.Gaikwad was examined as witness no.1 before the Trial Court. It is pertinent to note that evidence before charge was recorded by the Trial Court and the Court has prima facie found that the case for framing of charge under Section 25 of the PCPNDT Act is made out. The witness no.1 was cross examined by defence and further cross examination has been reserved. In the evidence of witness no.1, he has deposed that he was posted as Civil Surgeon in the District Civil Hospital, Jalna. It is further stated that information was received that accused is operating sonography machine unauthorizedly. Thereafter inquiries were made and the authority proceeded to the hospital. Inspection was carried out, however, the sonography machine was not found at the hospital. Thereafter the inspection of the hospital was conducted by the authorities. In pursuant to that, the residential premises were also visited and searched, and sonography machine was found at the residential premises. It is further stated that since there was violation of the provisions of PCPNDT Act, as stated therein, the proceedings were initiated against the petitioner-accused. He further stated that on 24th May 2011, directions were issued to Dr.Pandit, RMO, and Dr.A.M.Sharma, Medical Officer of Civil Hospital, Jalna to further proceed with the matter by sealing the sonography machine and to carry out further process. In the cross examination, the witness stated that on 11th August 2011, Dr.Pandit was Class-I medical officer having additional charge of Residential Medical Officer. On 11th August 2011, Dr.Pratap Jadhav was the Civil Surgeon of the District Civil Hospital, Jalna. It is also stated that the complaint Exhibit-1 is not lodged by the appropriate authority. However, he volunteered to state that he had delegated the powers of appropriate authority to Dr.Pandit. The said powers were delegated by him vide Exhibit-27.

10. The Trial Court vide order dated 30th January 2014 has

observed that as far as powers under Section 239 of Code of Criminal Procedure, 1973 are concerned, the Trial Court has to look into the matter as to whether there is ground for presuming commission of offence or whether the charge is groundless. It is observed that as per Panchanama dated 28th March 2011 and another panchanama Exhibit-28 that the sonography machine was lying in place where it was found. It is further observed that it is suffice to say that Dr.Pandit was next to Civil Surgeon being Resident Medical Officer and he was Class-I medical officer, Grade-I. The issue whether the Civil Surgeon, PW-1 Dr.Gaikwad, was having authority to delegate his powers or what would be delegation of power, would be considered at the time of hearing of the matter. There is prima facie material on record from which it is clear that the complainant was Resident Medical Officer in-charge and, therefore, he had authority to take action as per provisions of Section 28 of PCPNDT Act. The Court also considered the glaring admissions given at the instance of prosecution witness in the evidence recorded by the Court before framing charge. However, the Court had observed that admissions given by the said witness which are contrary to law, cannot be accepted at this stage. The Court further observed that the accused have committed offence; that there is prima facie material to opine that the accused have committed an offence punishable under Section 25 of PCPNDT Act.

11. The Sessions Court while dismissing the revision application preferred by the petitioner, has made several observations. In sum and substance it is observed by the Sessions Court that at this stage, on the basis of evidence recorded by the Trial Court, it has to be considered whether there is prima facie evidence to frame the charge

against the accused; and hence, the accused is not entitled to be discharged. The submissions advanced by learned counsel for petitioner were dealt with by the Revisional Court and thereafter the application came to be rejected. It is observed by the Sessions Court that Dr.Pandit is the authorized person and the authority has been given to him by appropriate authority i.e. the Civil Surgeon, Jalna. The Trial Court has recorded evidence of Civil Surgeon before framing charge and the Civil Surgeon has stated before the Trial Court that he was functioning as Civil Surgeon at the relevant time and he had authorized Dr.Pandit vide letter dated 24th May 2011, which is at Exhibit-27, for taking further action in the matter. Therefore, authorization letter is admitted by the Civil Surgeon. The Sessions Court, therefore, observed that in the case in hand, the appropriate authority being Civil Surgeon, has duly authorized Dr.Pandit to initiate proceedings against the petitioner. The Sessions Court has also taken into consideration Rule 18A of the PCPNDT Rules which was pointed out by the petitioner. The Sessions Court also referred to the fact that there was an amended provision in the said PCPNDT Rules. However, the Court came to the conclusion that the PCPNDT Rules are framed setting out code of conduct for the appropriate authorities. Section 28 of PCPNDT Act is incorporated in the said Act, which provides the procedure to be followed by the Court with reference to taking of cognizance of the complaint. Therefore, the Trial Court has rightly taken cognizance of the said complaint. The Sessions Court took recourse to Section 28 of the said Act, which gives power to the Court to take cognizance of the complaint. It was observed that complaint is required to be filed by appropriate authority concerned or any officer authorised by Central Government, State Government or the appropriate authority.

Dr.Gaikwad has issued authority letter in favour of Dr.Pandit (Exhibit-27). Hence, there is no violation of Section 28 of the Act. There is no need to adjudicate on the amended provision of Rule 18-A of the said Rules.

12. Taking into consideration the evidence recorded by the Trial Court, prima facie, it appears that the case of prosecution is that Dr.Gaikwad was the appropriate authority and he had authorised Dr.Pandit to file a complaint. The prosecution has placed reliance on the authority letter in support of its case. It is pertinent to note that the Trial Court has recorded the evidence before charge and the witness has been cross examined to that extent at the instance of defence. Further right to cross examine has been reserved. The Trial Court has observed that case is made out for framing charge under Section 25 of PCPNDT Act. This is a prima facie opinion of the Trial Court on the basis of material which was on record. I have also perused the observations made by the Trial Court as well as Sessions Court having concurred that at this stage defence raised by the accused cannot be accepted. The evidence of PW-1 and the documents on record prima facie shows that PW-1 was the appropriate authority, who authorized Dr.Pandit to file the complaint. I am in agreement with the observations made by the Trial Court as well as the Sessions Court. However, taking into consideration the fact that the Trial Court has only proceeded to frame charge, I do not wish to adjudicate on the said issue further, which may cause prejudice the right of the accused in the trial. It will be open to the accused to establish his defence in the further course of trial. This is not the stage to accept the defence raised by the petitioner. The Trial Court as well as the Sessions Court has come to the opinion, which is

prima facie in nature, which is sufficient to frame charge. In the circumstances, taking into consideration the evidence of PW-1 and the documents on record, I do not find it necessary to interfere in the orders passed by the subordinate Courts. PW-1, in his evidence, had stated that he had authorised Dr.Pandit to file complaint. He relied upon letter delegating powers to Dr.Pandit to proceed with the investigation as well as file complaint. The prosecution has also placed reliance upon notification dated 12th February 2008 which has been referred to above. In the circumstances, I am of opinion that prosecution cannot be quashed against the petitioner.

13. Hence, I pass following order :

ORDER

- (a) Criminal Writ Petition No.1473 of 2016 is dismissed;
- (b) It is clarified that observations made in this order are only for considering present writ petition and the Trial Court shall not influenced by the same at the time of trial.

(PRAKASH D. NAIK, J.)

MST